APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, *Plaintiff,* vs. FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants.*	CIVIL ACTION NO. 10463

FRANKLIN NIX, *Plaintiff,* vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendant.*	CIVIL ACTION NO. 13818

STATUS OF CASES

(Filed: Aug. 13, 1970)

In Civil Action 10463, plaintiff brought an internal union free speech case pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (hereafter

LMRDA), 29 U.S.C.A. §401 *et seq.* seeking injunctive and other relief from his expulsion from union membership. At a full hearing on the question of a preliminary injunction, it was stipulated by the parties that the Court's action would be 'final' on the injunctive features and constitute a complete trial on all issues other than the question of damages. After considering a number of preliminary matters, the Court held that Nix was unlawfully disciplined for making statements protected by LMRDA. An injunction issued, which the Court held also bound the parent international union, the Grand Lodge of the International Association of Machinists and Aerospace Workers. Nix v. Fulton Lodge No. 2 of IAM, 262 F. Supp. 1000 (N.D. Ga. 1967).

The Local Lodge and Grand Lodge appealed to the Fifth Circuit which affirmed the decision below in all respects except the application of the injunction to the Grand Lodge. The Court of Appeals held that although the substantive elements of a cause of action against the Grand Lodge existed under LMRDA, the District Court had never acquired jurisdiction over the international by virtue of proper designation of the international as a defendant and service of process, and it therefore could not make its injunction applicable to the Grand Lodge as well as the Local Lodge. Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 220 (5th Cir. 1969). But the Court of Appeals also held that upon remand, "Nix was entitled to amend and seek relief against the international." *Ibid.*

Accordingly, the plaintiff filed an amendment to his complaint adding the Grand Lodge as a defendant, and requesting appropriate service of process. But instead of asking the Court to remedy his expulsion from union

membership. Nix amended to allege wrongful discharge from his *employment* as Press Representative of the Grand Lodge, and prayed only for reinstatement to his employment and "all other appropriate relief."

The defendants have filed motions to dismiss. The Local Lodge contests the employment aspects of the amendment arguing that no relief for wrongful termination of employment could be granted against it, since it is not party to the employment relationship between Nix and the Grand Lodge. Both the local and the international argue that the Court has no subject-matter jurisdiction over the claim for relief from wrongful discharge, and that the allegations pertaining to wrongful discharge fail to state a claim upon which relief can be granted under LMRDA, or alternatively state a claim which is barred by principles of *res judicata*. While the Grand Lodge did contend that it had not been properly served with process, that contention was subsequently withdrawn when service was admittedly perfected on April 3, 1970.

On April 16, 1970, plaintiff filed a notice of dismissal of his amended complaint against the Grand Lodge. Less than two months later he filed C.A. No. 13818, in the face of which the defendants challenge the notice of dismissal in C.A. 10463 on various technical grounds.

In contrast to C.A. 10463, C.A. 13818 is addressed essentially to plaintiff's former employment with the Grand Lodge. Nix alleges that the Grand Lodge wrongfully, maliciously and wantonly disciplined him by firing him, and having its agent Fulton Lodge No. 2 expel him from membership. Although he does ask the Court to confiscate the record of the union proceedings directed toward expulsion, and to enjoin interference with his

exercise of the right to speak, publish or disseminate his views on union matters—relief directed toward his union membership status—Nix also prays restoration to his employment as press representative, and compensatory and punitive damages.

In Count II of the complaint in C.A. 13818, Nix brings a class action seeking declaratory and injunctive relief against the international's enforcing Article L, Section 3 of the IAM Constitution, on the grounds that the provisions of that section which authorize discipline of any member who circulates or causes to be circulated certain false and malicious statements against union members or officers, are inconsistent with the free speech provisions of LMRDA, *i.e.* 29 U.S.C.A. §411(a)(2).

The defendant international has moved to dismiss C.A. 13818, because of the pending C.A. 10463, on principles of *res judicata*, collateral estoppel, splitting causes of action, election of remedies, for failure to state a claim upon which relief can be granted, and lack of jurisdiction. The Grand Lodge has also moved to strike certain paragraphs of the complaint.

TERMINATION OF EMPLOYMENT

In C.A. 10463, this Court ruled that plaintiff could not invoke jurisdiction pursuant to Sections 102 and 609 of LMRDA, 29 U.S.C.A. §§412 and 529, in order to vindicate his right, if any, to employment as press representative by the Grand Lodge. See, Nix v. Fulton Lodge No. 2 of IAM, 262 F. Supp. 1000, 1004 (N.D. Ga. 1967). This ruling was not disturbed on appeal. Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 217 (5th Cir. 1969). The defendants' motions in C.A. 10463

and 13818 raise questions as to the effect of this ruling under principles of the law of the case and *res judicata*.

Before remand by the Court of Appeals, plaintiff had never sought relief for termination of his employment in C.A. 10463. The Grand Lodge was not a party to this action then. The issue as to the international's status in this litigation was raised for the first time by the local, which at the hearing on December 16, 1966, moved to dismiss for failure to join an indispensable party. The plaintiff, local and the Court agreed that the sole reason for adding the international would be to make certain that any injunction requiring reinstatement to union membership would be effective against all parties which controlled that status. Hearing, Dec. 16, 1966, T-49-50. Plaintiff never did effectively join the Grand Lodge, until remand by the Court of Appeals. Therefore, the issue of relief against the international for terminating plaintiff's employment was not actually raised, and could not have been raised before the amendment now challenged.

Thus, that earlier ruling stands as *dicta* only, and will not be given *res judicata* or collateral estoppel effects on the issue of relief for plaintiff's firing. At most, it is simply the laws of the case enunciated by this Court. This conclusion is reached in spite of the Fifth Circuit's ruling in Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 217 at n.11 (5th Cir. 1969). All that was held there was that the union-employee and union-officer cases proffered by the local were not relevant to the issue whether the offensive statements were protected by LMRDA, because at that point there was no issue in the case regarding Nix's firing.

The ruling that in a case brought pursuant to Sections 102 and 609 of LMRDA, plaintiff may not vindicate his right, if any, to employment as press representative by the Grand Lodge was based on the premise that these sections may be invoked to protect rights enunciated in Section 101 of LMRDA, 29 U.S.C.A. §411, only when such rights have been violated by acts affecting union membership status. *Accord*, Sewell v. The Grand Lodge of IAM, C.A. No. 3055-N (N.D. Ala., filed July 9, 1970). On reconsideration, the Court feels that the statute should not be construed that narrowly. *Cf.* International Brhd. of Boilermakers v. Braswell, 388 F.2d 193, 200-201 (5th Cir. 1968). Rather, when a plaintiff asserts his union has invoked sanctions in violation of specific rights secured under Section 101, the courts have jurisdiction of his claim even if the particular sanctions applied affect plaintiff's status as an appointed or elected union officer, official or employee, rather than his status as a member. Such sanctions are within the scope of the phrase "or otherwise discipline" as used in Section 609 of LMRDA, 29 U.S.C.A. §529. *See* Grand Lodge of IAM v. King, 335 F.2d 340, 344-345 (9th Cir. 1964), *aff'g.* 215 F. Supp. 351, 354 (N.D. Cal. 1963), *cert. den.* 379 U.S. 920 (1964); Cefalo v. International Union of Dist. 50 Mine Wkrs., 311 F. Supp. 946, 953 (D.D.C. 1970); Retail Clerks Union, Local 648 v. Retail Clerks Intl. Assn., 299 F. Supp. 1012, 1020-1021 (D.D.C. 1969); DeCampli v. Greeley, 293 F. Supp. 746, 751-753 (D.N.J. 1968); Gulickson v. Forest, 290 F. Supp. 457, 464 (E.D.N.Y. 1968); Hill v. ARO Corp., 275 F. Supp. 482, 489 (N.D. Ohio 1967); George v. Bricklayers, M. & P. Int'l. Union of America, 255 F. Supp. 239, 242 (E.D. Wis. 1966); *contra*, Thompson v. New York Central R.Co., 361 F.2d 137, 145 (2d Cir. 1966);

Air Line Stewards and Stewardesses Assn. v. Transport Wkrs. Union, 334 F.2d 805, 808 (7th Cir. 1964); Strauss v. International Bhd. of Teamsters, C.W. and H. of America, 179 F. Supp. 297, 300 (E.D. Pa. 1959). Careful distinction between the rights protected by Section 101 (*e.g.* freedom of speech) and the sanctions invoked in violation of those rights (*e.g.*, expulsion from union membership or termination of employment) reveals that it is not sufficient to simply state that the LMRDA protects only 'membership rights' in the union. For while it is agreed that the LMRDA provides no remedy for union action arguably violating a member's Section 101 rights, but affecting only his employment with some third party, Seeley v. Brotherhood of Painters, etc., 308 F.2d 52, 60 (5th Cir. 1962), the situation is different where a union violates its member's protected rights by action adversely affecting his status as an appointed or elected officer, official or employee of that union. The union may not use the coincidence of that status to restrict that member's Section 101 rights.

Accordingly, in the abstract, the Court has jurisdiction over plaintiff's amendment in C.A. 10463 praying for relief against the Grand Lodge for firing him, and that amendment does state a claim upon which relief can be granted—at least in the sense that plaintiff conceivably could prove a set of facts entitling him to recovery. The same conclusions follow for the claim stated as part of the separate civil action, C.A. 13818. These conclusions are reached in spite of the facts that the Court's prior ruling arguably set the law of the case. It is well recognized that the law of the case does not inexorably bind the court which enunciated it, and at least one commentator recommends that a court reverse itself

when convinced that its previous enunciation was erroneous. 1B Moore's Federal Practice ¶0.404[1]405-409 (2d Ed. 1969).

EFFECT OF NLRB DECISION AND JUDICIAL REVIEW THEREOF

Although it has been determined that the Court has jurisdiction over plaintiff's present claim against the Grand Lodge, and that the relevant allegations do state a claim upon which relief can be granted—at least in the sense that conceivably plaintiff could prove a set of facts entitling him to recovery—it appears that the controlling issue of fact in that claim has been determined adversely to the plaintiff in a prior proceeding, and that under the principles of collateral estoppel, that determination precludes recovery here.

When the plaintiff was fired, he filed unfair labor practice charges with the NLRB, alleging a discriminatory discharge in violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C.A. §§158(a)(1) and 158(a)(3). However, the Board found as a matter of fact that Nix had been discharged for pilfering documents from his superior at IAM. Nix v. N.L.R.B., 418 F.2d 1001, 1005 (5th Cir. 1969). On petition for review of the Board's decision, the Court of Appeals affirmed that finding of fact by ruling that there was substantial evidence to support the Board's finding that Nix was discharged "for cause." Nix v. N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969).

In either C.A. 10463 or C.A. 13818, under the principles of collateral estoppel, the Board's finding of fact—made after an adversary hearing and upheld on judicial review—controls the issue of the reasons Nix was fired.

Purvis v. Great Falls B. & C. Trades Council, 266 F. Supp. 661, 662-663 (D. Mont. 1967); *see also* Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, 344 F.2d 300, 306 (9th Cir. 1965).

The court is aware that some cases might support a contrary conclusion. However, they were ruling in a different context. In Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local Union No. 584, 359 F.2d 598 (2d Cir. 1966), the Court of Appeals ruled that a decision of the NLRB that a union had violated Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C.A. §158(b)(4) would not be binding on a court confronted with that issue in a civil action brought pursuant to Section 303 of the LMRDA, 29 U.S.C.A. §187. *Id.* at 602, n. 7. *See also* Taube Electrical Contractors v. International Bhd. of Elec. Wkrs, Local Union No. 349, 261 F. Supp. 664 (S.D. Fla. 1966). And in Thompson v. Moore, 223 F.2d 91 (5th Cir. 1955), *aff'g* 131 F. Supp. 658 (S.D. Tex. 1953), the Court of Appeals held that where the Railroad Retirement Board found a former railroad employee still "permanently disabled for work," and the employee proceeded directly to court rather than first exhausting his administrative remedy, the findings of the Board were not conclusive (the term *res judicata* was used by the lower court) in the employee's suit for damages against the railroad which refused to rehire him. 223 F.2d at 93. However, the Court does not deem these cases controlling here.

Accordingly, Nix's claim for relief against the Grand Lodge for firing him fails, whether asserted by amendment in C.A. 10463 or in a separate action, Count I of C.A. 13818. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted—

treated here as a motion for summary judgment—is granted, without prejudice in C.A. 10463 to plaintiff's right to amend as outlined below.

COUNT II OF C. A. 13818

Plaintiff seeks declaratory and injunctive relief against the Grand Lodge, specifically asking the court to strike down Article L, Section 3 of the IAM Constitution on the grounds that it is inconsistent with the free speech provisions of LMRDA, Section 101(a)(2), 29 U.S.C.A. §411(a)(2). He seeks such relief in the form of a class action, alleging that he represents all the members of IAM in the United States.

The scope of the class Nix claims to represent is on its face overly broad. Only the claims of union members against whom Article L, Section 3 is being invoked present a sufficiently justiciable controversy for judicial resolution. *See* Golden v. Zwickler, 394 U.S. 103, 108 (1969); United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947). Accordingly, the scope of the class is deemed restricted to such persons.

This claim should have been made by amendment to the complaint in C.A. 10463. It is essentially an allegation that when Local Lodge No. 2 expelled Nix from membership, the international was acting as agent for the Grand Lodge. The claim is therefore very much bound up with plaintiff's claims against the local. Accordingly, C.A. 13818 is dismissed ~~without~~ prejudice to plaintiff's right to amend in C.A. 10463 in order to assert the

claim made in Count II of C.A. 13818, as limited by the immediately preceding part of this opinion.

IT IS SO ORDERED.

This is the 12th day of August, 1970.

s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, *Plaintiff,* vs. FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants.*	CIVIL ACTION NO. 10463

FRANKLIN NIX, *Plaintiff,* vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendant.*	CIVIL ACTION No. 13818

ORDER THAT ORDER OF AUGUST 13, 1970, DEALING WITH COUNT II STANDS AS ENTERED

(Filed: Nov. 16, 1970)

On August 13, 1970, an order was entered in these two actions. All parties apparently are unhappy with it

and have filed motions to clarify some aspects and reconsider others.

I.

In Civil Action Number 10463, no ruling was made on the defendant Grand Lodge's objection to plaintiff's notice of dismissal. In order to enter further ruling, some chronology is necessary:

February 20, 1970—after remand from the Court of Appeals, plaintiff filed an amended complaint, naming the Grand Lodge as a defendant,

March 10, 1970—amended complaint served on Roy M. Bond, Jr.;

March 30, 1970—motions to dismiss filed by the Grand Lodge (one ground challenged service on Bond), and by Fulton Lodge No. 2;

April 3, 1970—amended complaint served on H. C. Summers;

April 15, 1970—motions to dismiss renewed by both defendants;

April 16, 1970—plaintiff filed a notice of dismissal of the amended complaint against the Grand Lodge.

The Grand Lodge objects that before plaintiff filed his notice of dismissal, it had filed motions which, for purposes of Fed. R. Civ. P. 41(a)(1), should be considered motions for summary judgment precluding plaintiff from dismissal by stipulation. That defendant's motions were based on three grounds: (1) insufficiency of service of process; (2) lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted because, a plaintiff may not invoke federal

jurisdiction pursuant to Sections 102 and 609 of LMRDA, 29 U.S.C.A. §§412 and 529 in order to vindicate his right (if any) to employment as press representative by the Grand Lodge; (3) res judicata. Accompanying the Grand Lodge's motions were an affidavit relating to service of process and copies of Fulton Lodge No. 2 v. Nix, 415 F.2d 212 (5th Cir. 1969) (the prior appeal in this case), of Nix v. N.L.R.B., 418 F.2d 1001 (5th Cir. 1969), the Court of Appeals' review of Nix's unfair labor practice charge against the union. The affidavit relates solely to the issue of the validity of the March 10, 1970, service of process. The copies of cases are relevant only to the defense of res judicata.

The Grand Lodge cites Harvey Aluminum Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953). In that case the Court held that even though no answer or motion for summary judgment had been filed, the plaintiff could not voluntarily dismiss by stipulation where issue on the merits had been joined in an extended (3 day) hearing on plaintiff's motion for a preliminary injunction. The Grand Lodge also relies on Butler v. Denton, 150 F.2d 687 (10th Cir. 1945), where the Court of Appeals held that plaintiff had no absolute right of dismissal before the filing of an answer or motion for summary judgment but after the United States filed a petition for intervention which tendered justiciable issues (on the merits). 150 F.2d at 690. And the Grand Lodge finally cites Tele-Views News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961), to the effect that the plaintiff loses his right to dismiss by stipulation once the defendant has filed a motion to dismiss for failure to state a claim upon which relief can be

granted, even if the motion is unaccompanied by affidavits or other extraneous matter.

The Court respectfully rejects the views expressed in *Tele-Views, supra*. Fed. R. Civ. P. 41(a)(1) does not admit of the interpretation that that Court made. The rule simply does not cover the situation in which a defendant has filed a motion to dismiss supported by extraneous matter: under such circumstances, whether to allow dismissal must be resolved by the exercise of sound judicial discretion. Kilpatrick v. Texas & P. Ry. Co., 72 F. Supp. 632, 633 (S.D.N.Y. 1947). For purposes of Fed. R. Civ. P. 41(a)(1) a motion to dismiss accompanied by affidavits or other extraneous matter should not preclude voluntary dismissal by stipulation unless the motion to dismiss raises justiciable issues regarding the merits of the claim, or comes at such an advanced stage of the proceedings that it is manifestly unfair to allow plaintiff an automatic uncontested dismissal. The other cases relied on by the Grand Lodge appear to involve such circumstances, and therefore are not persuasive here, where the proceedings against the Grand Lodge—especially those regarding plaintiff's firing—had not reached an advanced stage, and where the motion to dismiss supported by extraneous matter raised only questions as the jurisdiction and *res judicata*. *See* Toulmin v. Industrial Metal Protectives, 135 F. Supp. 925, 927-928 (D. Del. 1955).

The Grand Lodge also argues that plaintiff's right, if any, to drop his claim against it is governed by Fed. R. Civ. P. 21, which allows a party to be dropped only by court order. This contention is without merit. Under Fed. R. Civ. P. 41(a)(1), the word "action" means all claims against any one defendant, and a dismissal by

notice can be effective against less than all defendants. Terry v. Pearlman, 42 F.R.D. 335, 337 (D. Mass. 1967).

Accordingly, the Grand Lodge's objections to plaintiff's notice of dismissal in Civil Action Number 10463 are overruled.

II.

Count I of the complaint in Civil Action Number 13818 was a claim against the Grand Lodge under LMRDA to the effect that termination of plaintiff's employment as a Grand Lodge press representative violated rights secured by Section 101 of LMRDA, 29 U.S.C.A. §411. The Court ruled that although it does have subject matter jurisdiction over such a claim, and although allegations to that effect do state a claim upon which relief theoretically could be granted, nevertheless a controlling issue of fact in that claim had been adjudicated adversely to the plaintiff in a prior proceeding, and that principles of collateral estoppel required judgment for the defendant on Count I of Civil Action Number 13818. Nix v. The Grand Lodge of the International Ass'n. of Machinists, C.A. No. 13818 (N.D. Ga., filed August 13, 1970).

The Grand Lodge requests reconsideration of the decision that there is subject matter jurisdiction and that Count I states a claim upon which relief theoretically can be granted. But this request includes no legal authority, and raises no points not already considered. Accordingly, this aspect of the prior decision stands.

Plaintiff requests reconsideration of the decision that by virtue of collateral estoppel, the determination of the NLRB that he was fired for pilfering documents from a superior, specifically upheld upon review in Nix v.

N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969), is controlling in Civil Action No. 13818. Upon further research, that view of collateral estoppel appears correct, and the decision stands as made. *See* Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969); Hyatt Chalet Motels, Inc. v. Salem Bldg. & Constr. Trades Council, 298 F. Supp. 699, 701-703 (D. Ore. 1968). Plaintiff also asserts that the defense of *res judicata* cannot be raised by motion to dismiss. This contention is without merit. *See* Thomas v. Consolidation Coal Co., 380 F.2d 69, 75 (4th Cir. 1967); Larter & Sons v. Dinkler Hotels Co., 199 F.2d 854, 855 (5th Cir. 1952). There is likewise no merit to plaintiff's contention that he has not had an adequate opportunity to be heard on this issue. Local Rule 8(d) provides that usually, all motions are decided on brief without a hearing. The Court is not aware that oral hearings on motions to dismiss or for summary judgment are mandatory under Constitutional principals or the Federal Rules of Civil Procedure. Local Rule 8(b) requires that any response to a written motion be submitted within 10 days thereof. However, this rule is not rigidly enforced, and in fact the Court would probably have considered any brief submitted between the time the motion was originally filed (March 30, 1970)[1] and the date of decision (August 13, 1970).

Finally, plaintiff objects to the restriction placed on his Count II class claim by the order of August 13, 1970. Simultaneously, the defendant argues that the Court should not have allowed the plaintiff to maintain a class

[1]The district court erred. The instant action, Civil Action No. 13818, was not filed until June 3, 1970, and the defendant's motion to dismiss was not filed until June 26, 1970.

action at all, because plaintiff has not and cannot show facts justifying a class proceeding, and because the claim sought to be made as a class action in Civil Action No. 13818 could have been brought originally in Civil Action No. 10463.

Eyers v. Dwyer, 358 U. S. 202 (1958), relied on by plaintiff, does not require that the Court allow plaintiff to bring this action on behalf of every member of IAM in the United States. That decision dealt only with the question whether the individual plaintiff had presented a justiciable claim, and did not reach the question of the scope of the class. Therefore, plaintiff's objection to the restriction is not well taken.

Contrary to the defendant's contention, a complaint in a class action need not state sufficient facts to support the conclusion that a class action can be maintained. Such a requirement would constitute a return to fact pleading, contrary to the intent of the Federal Rules of Civil Procedure. *See* 5 Wright and Miller, Federal Practice and Procedure §1202 (1969). Neither is there substance to the contention that the provisions of Section 101(a)(2) of LMRDA, 29 U.S.C.A. §411(a)(2) preclude a class attack on the IAM's anti-sedition section leaving only the question whether, in the case of each individual, application is unreasonable. Such a section may be overly broad, unnecessarily vague, or otherwise unreasonable on its face.

The Court agrees with the Grand Lodge that the class claim originally brought as Count II of Civil Action No. 13818 should be brought as part of Civil Action No. 10463 rather than as a separate action. The original Civil Action No. 10463 was a claim against Fulton Lodge

No. 2 that plaintiff's rights under LMRDA were violated by his expulsion from membership. That expulsion was based on the premise that certain of plaintiff's conduct violated Article L, Section 3, lines 21-25 of IAM's Constitution. Count II of Civil Action No. 13818 was simply a claim that those same rights (and the rights of persons similarly situated) are violated by the existence and threatened application of that provision of the Union constitution.

Clearly, principles of *res judicata* require that two such interlocked claims be brought in the same lawsuit. *Cf.* Rhodes v. Jones, 351 F.2d 884, 889 (8th Cir. 1965). Therefore, plaintiff may not maintain a separate action on the class claim. However, this case is not in a posture which either requires or persuades the Court to deny plaintiff leave to amend to add the class claim. The issue of damages in Civil Action No. 10463 is still pending. The class claim should not require another hearing, and hopefully the only facts not now of record will relate to the scope of the class.

Accordingly, that part of the Order of August 13, 1970, dealing with Count II of Civil Action No. 13818 (pp. 9 and 10) stands as entered.

IT IS SO ORDERED.

This the 13th day of November, 1970.

s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1395

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee.

versus

FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL,
Defendants-Appellees-
Cross Appellants.

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Northern District of Georgia

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(November 17, 1971)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal has to do with two suits filed in the Northern District of Georgia. In the first, Civil Action No. 10,463, filed pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USCA, § 401 *et seq.*, plaintiff sought to enjoin his expulsion from union membership and also claimed damages. The district court found that he had been unlawfully disciplined for making statements protected by the free speech provision of the LMRDA, 29 USCA, § 411 (a) (2). Injunctive relief was granted against the Local Lodge and the International Association of Machinists and Aerospace Workers (Grand Lodge). *Nix v. Fulton Lodge No. 2 of IAM*, N.D. Ga. 1967, 262 F.Supp. 1000. The question of damages was reserved.

Both the Local Lodge and the Grand Lodge appealed to this court. The decision below was affirmed in all respects except as to the application of the injunction to the Grand Lodge. We held that the District Court never acquired jurisdiction over the Grand Lodge by virtue of proper designation of the Grand Lodge as a defendant, service of process, or appearance. In reversing as to the Grand Lodge we held that Nix would be entitled, on remand, to amend to seek relief against the Grand Lodge. *Fulton Lodge No. 2 of IAM v. Nix*, 5 Cir. 1969, 415 F.2d 212, 220.

Accordingly, appellant Nix filed an amendment to his complaint in the district court adding the Grand

Lodge as a defendant. However, in the same amendment, he expanded the scope of the suit to allege wrongful discharge from his employment as Press Representative for the Grand Lodge and prayed for reinstatement to employment and other appropriate relief.

The defendants filed motions to dismiss the amended complaint, urging lack of subject-matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted under the LMRDA, or in the alternative, that the claims were barred by principles of *res judicata*. Thereafter, plaintiff filed a notice of dismissal of this amended complaint against the Grand Lodge, thus eliminating the claim for reinstatement to his job as Press Representative for the Grand Lodge and for damages against the Grand Lodge on account of the discharge. The Grand Lodge objected to the dismissal.

Meanwhile, some two months later, plaintiff filed the second suit, Civil Action No. 13,818. Count I of the complaint was addressed essentially to plaintiff's former employment with the Grand Lodge. He alleged wrongful, malicious, and wanton conduct in administering discipline under the IAM constitution which resulted in his discharge from employment and expulsion from union membership. In the way of relief he requested restoration to employment with the union, damages and counsel fees. This complaint contained a second count which sought declaratory and injunctive relief on behalf of all union members against the Grand Lodge's enforcement of Article L, § 3 of the

IAM constitution, on the ground that its provisions authorizing discipline of union members for false or malicious statements against other union members or officers are inconsistent with the free speech provisions of LMRDA, 29 USCA, § 411 (a) (2).

The district court overruled the Grand Lodge's objection to its dismissal from C.A. No. 10,463. Then as to Count I of C.A. No. 13,818, the court ruled that principles of collateral estoppel required judgment for the Grand Lodge on that count. As to Count II, the court over objection from the Grand Lodge, allowed the class action to be brought but narrowed the class. This count was then dismissed with permission granted to plaintiff to add it by amendment to C.A. No. 10,463.

It is plaintiff's position on this appeal that the district court erred in dismissing Count I in C.A. No. 13,818, and in narrowing the class in Count II as well as in dismissing it. The Grand Lodge complains in its cross-appeal of its dismissal in C.A. No. 10,463. This latter suit is now pending in the district court on the claim for damages against the local union. We affirm on the appeal and cross-appeal.

I.

We turn to Count I in C.A. No. 13,818 in which plaintiff sought restoration of his employee status and damages for discharge. The district court concluded that the controlling issues of fact surrounding plaintiff's dismissal from his employment with the Grand Lodge were determined adversely to plaintiff in a prior pro-

ceeding before the National Labor Relations Board which was affirmed by this court in *Nix v. NLRB*, 5 Cir. 1969, 418 F.2d 1001. This earlier determination was held to preclude recovery by plaintiff on Count I. We agree. See, *H. L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519*, 5 Cir. 1970, 429 F.2d 520; *Painters District Council No. 38 v. Edgewood Contracting Co.*, 5 Cir. 1969, 416 F.2d 1081.

II.

As to Count II of the C.A. No. 13,818, both plaintiff and the Grand Lodge take exception to the ruling of the district court. The Grand Lodge contends that no class action will lie on the free speech question presented in connection with Article L, § 3, of the IAM constitution. Plaintiff contends that the court erred in narrowing the class from all members of the Grand Lodge to only those members against whom the provision was being invoked.

On the authority of *Golden v. Zwickler*, 1969, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113, the district court determined that no justiciable "controversy" is present except where Article L, § 3 of the IAM constitution is being invoked against union members. For that reason the district court limited the class to such persons. We agree that only then would the judicial resolution be limited to "... concrete legal issues, presented in actual cases, not abstractions . . ." *United Public Workers of America v. Mitchell*, 1947, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754.

We conclude that there is no merit in either the appeal or cross-appeal as to Count II of the complaint. The cause of action asserted can be included by amendment to C.A. No. 10,463. Plaintiff will not be harmed by such a course and the district court was well within its case management discretion in the action taken. This leaves the matter in the posture where the district court can determine, in the event of amendment, as its order contemplates, whether the matter should proceed as a class action at all, depending on whether the requisites of Rule 23, F.R.Civ.P., are met.

III.

The last issue arises under the cross-appeal of the Grand Lodge wherein it is contended that the district court erred in permitting its dismissal by stipulation under Rule 41(a) (1), F.R.Civ.P.,[1] by plaintiff.

Although no answer had been filed, the Grand Lodge contends that before plaintiff filed his notice of dismissal, it had filed motions which, for purposes of Rule 41(a) (1), should be considered motions for summary judgment which precluded dismissal under the Rule. These motions were based on four grounds: (1) insufficiency of service of process; (2) lack of subject matter jurisdiction; (3) a failure to state a claim upon which relief could be granted; and (4) *res judicata*.

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[1] "(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.
(1) By Plaintiff; by Stipulation. . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . ."

No affidavits or other matters outside the pleadings pertinent to (3) or (4) above (motions filed pursuant to Rule 12(b) (6), F.R.Civ.P.), were submitted by the Grand Lodge so as to convert the motions into motions for summary judgment under Rule 56 as provided in Rule 12(b), F.R.Civ.P. By no stretch of the imagination can the Xerox copies of opinions of this court, attached to a memorandum of law submitted by the Grand Lodge in connection with the Rule 12(b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12(b) (6) motion into a motion for summary judgment. Cf. *Miller v. Reddin*, 9 Cir. 1970, 422 F.2d 1264.

The district court did not err in allowing the Rule 41 (a) (1) dismissal.

AFFIRMED.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1395

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee,

versus

FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL,
Defendants-Appellees-
Cross Appellants.

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 17, 1971, 5 Cir., 1971, ____ F.2d ____).

(January 5, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX E

THE NLRB PROCEEDING

In early 1965 the staff employees of the employer union [IAMAW] were the only unit of the IAMAW not represented by an independent bargaining agent. At this time petitioner Nix founded the IAM Representatives Association and initiated an organizing campaign to make Representatives Association the independent bargaining agent for staff employees. Though the employer was itself a union, the year-long organizational effort of the Representatives Association was bitterly opposed by the employer IAMAW. In August 1966, after a representation case and an NLRB election, the Representatives Association received NLRB certification as the bargaining representative for all IAMAW field staff employees. One month later, in September 1966, petitioner was fired with the explanation that there was no more work for him. Petitioner filed unfair labor practice charges with NLRB, alleging violations of Sections 8(a)(1) and 8(a)(3) of the NLRA, as well as an 8(a)(5) refusal to bargain charge.

At trial before an NLRB trial examiner, petitioner was not represented by private counsel. Petitioner was told by government counsel that he would not be permitted to examine or cross-examine witnesses. Neither was petitioner allowed any voice in the introduction or exclusion of documentary evidence, nor a voice in stipulations made at trial. Board attorneys even refused petitioner's request that the witnesses be sequestered, thereby allowing respondent IAMAW Grand Lodge officers to sit together in the hearing room, confer with one another, and repeat each other's testimony on the witness stand.

Before the unfair labor practice charges had come to trial, the respondent IAMAW admitted that its alleged reason for firing petitioner was false, but asserted instead that Nix had been fired for "pilfering" the personal papers of his superior, IAMAW Vice Pesident George Watkins. At trial Nix testified that he had indeed made Xerox copies of union records; records which showed conclusively that Vice President Watkins had been systematically defrauding the union through the embezzlement of union funds. Most of these records were office records to which Nix had full and free access at all times, including times when he was fully in charge of the union's Southern Territory office, and were not "pilfered" in any sense of the word. As to the copying of a day book desk calendar kept by Vice President Watkins, Nix testified that he had made copies of this at the request of the IAMAW's international president.

At trial, petitioner testified that not only had he a right and a duty as a union member to expose the theft of union funds, but also that his activity had been expressly authorized by the very same IAMAW officers who later sought before the NLRB to characterize his actions as "pilfering." At trial, no note was made of the fact that petitioner had made written demands as a union member under § 501(b) of the LMRDA[1] for an accounting and

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[1] 29 U.S.C. §501. Fiduciary responsibility of officers of labor organizations.

(a) Duties of officers; exculpatory provisions and resolutions void.

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its mem-

recovery of union funds misappropriated by Vice President Watkins and other officers. Though the union repeatedly labeled petitioner a "pilferer," scant attention was devoted to the fact that Vice President Watkins, the officer Nix had exposed, had made restitution to the Union by a personal check for the exact amount of funds he had been accused by petitioner of embezzling.

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bers and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses.

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Nix testified that at the request of the IAMAW's international president, he took copies of these documents to Washington in July 1965. Not until 16 months later in November 1966, was petitioner given any notice that his activities were considered "pilfering." This notice came after petitioner had successfully organized the IAM Representatives Association, and after petitioner had been fired for an admittedly false reason in September 1966, one month after winning the staff union election.

Petitioner's repeated efforts to have his alleged "pilfering" considered in light of his rights and duties as a union member and fiduciary under Title V of the LMRDA went unheeded. Petitioner was told by NLRB attorneys that the NLRB lacked jurisdiction over LMRDA and that petitioner would have to litigate LMRDA rights in federal court. Petitioner asserted that since his exposure of union corruption was both a right and a duty under LMRDA and the IAMAW Constitution, it could not be a legitimate ground for discharge under the NLRA. To this the Board attorneys replied that they were concerned only with rights under the NLRA; that they could not enforce rights under any other Act; and that they would not litigate matters pertaining to the internal union affairs of the IAMAW.

Thus while attorneys for the General Counsel concerned themselves with proving that petitioner had been unlawfully discharged for organizing the Representatives Association, the testimony regarding petitioner's alleged "pilfering" was never challenged in light of his LMRDA rights. At no point in the NLRB proceeding was there any argument, recognition or consideration of petition-

er's rights and sworn duties as a union member under the IAMAW Constitution and the LMRDA.

The trial examiner found that the General Counsel had established a prima facie case of discriminatory discharge from employment but held that petitioner's alleged "pilfering" was a legitimate reason for discharge.[2] On appeal to the NLRB, the trial examiner's decision was affirmed. IAM, 172 NLRB No. 239 (Sept. 18, 1968). On appeal before the Court of Appeals for the Fifth Circuit, an appeal based upon the NLRA and not the LMRDA, the NLRB decision was affirmed. *Nix v. NLRB*, 418 F.2d 1001 (5th Cir. 1969).

The Filing of the LMRDA Action

The current action was thus commenced in federal district court as an amendment to an earlier LMRDA action (C.A. No. 10463) in which petitioner had sought and won a permanent injunction against his expulsion from the IAMAW, and against interference with his rights of free speech under § 101(a)(2) of the LMRDA.[3]

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[2]A typical illustration of the difficulties and impossibilities petitioner encountered in attempting to have the NLRB recognize his union membership rights under LMRDA, is seen in two demands he made upon the IAMAW officers for recovery and an accounting of misspent funds under § 501(b) of LMRDA. The two written demands specified the LMRDA section upon which they were based and were signed by petitioner *as a union member*, not as an employee, with his union membership card number as specified by the IAMAW Constitution. The second demand was made because the IAMAW officers had ignored the first demand. In his decision the NLRB trial examiner, without reference to the union membership-LMRDA nature of the two demands, characterized them as an "unremitting attack" by Nix, as an *employee*, against his employers.

[3]The IAMAW's illegal attempt to expel petitioner from union membership for exercising his free speech rights under §101(a)(2) came only a week after petitioner was discharged from employ-

This injunction was affirmed by the Fifth Circuit Court of Appeals in *Nix v. Fulton Lodge No. 2*, 415 F.2d 212 (5th Cir. 1969). Unfortunately, at the time petitioner sought his free speech and membership restoration injunction, his charges regarding his discharge from employment were still awaiting a hearing before the NLRB, and the IAMAW had not at that time changed its defense from that of having no work for Nix to that of his being a "pilferer." Thus, at the outset of his LMRDA membership action, Nix had no cause to assert that he had been discharged for asserting any of his membership rights under LMRDA. Only after he was accused of "pilfering" was it apparent that petitioner had been discharged for exercising his right to expose union corruption under Title V of the LMRDA.

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ment in September 1966. During the NLRB hearing on petitioner's discharge from employment, the trial examiner took no notice of the IAMAW's collateral attack on petitioner's union membership.